

DATE: July 16, 1987

TO: Captain Crow, San Diego Police Department

FROM: City Attorney

SUBJECT: Closing of Fiesta Island

By memorandum dated May 19, 1987 you posed the following questions concerning the legality of closing Fiesta Island in Mission Bay Park.

1. Can Fiesta Island be closed to all persons at a given time?
2. Who has the authority to initiate such a closing?
3. Can the closing be permanent, e.g., from 10:00 p.m. until 6:00 a.m. every night? Could it be seasonally, e.g., between Memorial Day and Labor Day?
4. Can a police officer/supervisor order that Fiesta Island be closed temporarily?
5. If temporarily closed by a police officer/supervisor, does any person or group have the right to enter or remain on Fiesta Island?

Your first and third questions will be answered together since they inquire whether Fiesta Island may be closed and, if so, may the closure be seasonal and/or only in the evenings. As a general rule, property acquired through a grant deed as a public trust such as Fiesta Island may not be used in a way inconsistent with that deed. Thus, the grant deed of Mission Bay to the City will be examined in order to determine if the closure of Fiesta Island is legally permissible.

In 1945, Mission Bay lands and tidelands were granted in trust to the City with certain conditions. Statutes of 1945, Chapter 142. Subsection (a) of the public trust mandates the tidelands, including Fiesta Island, be used by the City solely for "educational, commercial and recreational purposes, including the necessary streets, highways and other facilities convenient thereto. . . ." This section is backed up by the general

guarantee of access to navigable waters within the State of California. This guarantee is created pursuant to California Constitution article X, section 4 which provides:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to . . . destroy or obstruct the free navigation of

such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

These provisions prohibit completely restricting public access to the bay; hence, total closure of access to the Fiesta Island is impermissible.

Additionally, closure cannot be inconsistent with subsection (d) of the public trust which grants the public an absolute right to fish in Mission Bay. This subsection has been interpreted by this office to merely require some portion of Mission Bay fishing areas to remain open at all times, and therefore, the temporary closing of one section of the bay would be permissible.

The final hurdle posed by the controlling provisions arises out of the need to close the only entrance to Fiesta Island. In order to close off Fiesta Island, the right-of-way to the Island and bay access would have to be blocked off. At first glance this closure appears to be contrary to the constitutional guarantee of article X, section 4 requiring the absolute right-of-way access to navigable waters. However, the Attorney General has made it clear that a reduction in the number of streets to a water front is not a denial of reasonable access guaranteed by the constitution so long as a reasonable number of adequate public streets or rights-of-way remain. 41 Op. Att'y Gen. 39, 42 (1963). Here, closing of the right-of-way to Fiesta Island in order to prevent entrance will not deny access to the rest of Mission Bay's navigable waters since access is available by other streets and sidewalks.

With these provisions of the public trust and the California Constitution in mind, it is clear that Fiesta Island may not be closed permanently to all persons at all times. However, Fiesta Island may be closed on a part-time basis during certain times of the year, or during peak problem times of the day or evening. Closure could probably be most effective on summer weekend evenings since it appears this is the most problematic time of the year. Crime statistics gathered during the summer months

would support the regulation as a function of the City's police power and provide a rational basis for such regulation.

The City Manager currently has the authority to regulate parking on Fiesta Island and may close the Island to vehicles. Signs must be posted giving notice of any special conditions or restrictions. San Diego Municipal Code section 63.05. It is an infraction to violate regulations or conditions imposed under

this section. San Diego Municipal Code sections 63.05 and 11.12.

Your second question seeks to determine who has the authority to initiate the closing of Fiesta Island. The City Manager is ultimately responsible for the control and management of City parks, beaches and recreational facilities as well as the enforcement of regulations adopted by Council action. San Diego City Charter section 55. The Park and Recreation Department has jurisdiction and control of beaches and adjacent City owned land and waters for carrying out the day to day operations. San Diego Municipal Code sections 63.01 and 63.20. Thus, the appropriate procedure to close Fiesta Island during certain times of the day or evening would be to enact an ordinance initiated by the City Manager, using Police Department statistics.

The ordinance challenged in the case of *People v. Trantham*, 161 Cal.App.3d Supp. 1 (1984) serves as an example of a valid park closing ordinance. In *Trantham*, the court upheld the validity of a Los Angeles ordinance which closed a City park between the hours of 10:30 p.m. and 5:00 a.m. In so doing, the court stated:

It is likewise beyond dispute that: "A municipality has broad power to enact 'all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.' (Cal. Const., art. XI, . 7.) An ordinance so enacted will ordinarily be upheld if 'it is reasonably related to promoting the public health, safety, comfort, and welfare, and if the means adopted to accomplish that promotion are reasonably appropriate to the purpose. ¶Citations.σ' (*Higgins v. City of Santa Monica*, 62 Cal.2d 24, 30 ¶41 Cal.Rptr. 9, 396 P.2d 41σ.)" (*Sunset Amusement Co. v. Bd. of Police Comm'rs* (1972) 7 Cal.3d 64, 72 ¶101 Cal.Rptr. 768, 496 P.2d 840σ.) (Emphasis added.)

Although Fiesta Island may not permanently be closed at all times, The City of San Diego may for public health, safety and welfare reasons close the area during certain hours of the day or night. Justification for part-time closure of Fiesta Island

would include large unruly crowds, illegal vehicle racing, injuries to park party-goers and police officers, police enforcement problems and damage to the park's vital resources.

Your fourth question asks whether a police officer/supervisor may order Fiesta Island closed temporarily. The answer is yes,

but only in an emergency situation pursuant to San Diego Municipal Code section 81.08 and California Penal Code section 409.5. Municipal Code section 81.08 provides that, where large numbers of people and vehicles are gathered, a police officer may prohibit any person from parking any vehicle or using any street or sidewalk. Additionally, Penal Code section 409.5(b) provides for the closing off of an area by a police officer which surrounds or is near an emergency situation. Thus, when an emergency situation develops on Fiesta Island which is caused by large numbers of unruly weekend crowds, the police may lawfully seal off Fiesta Island on a temporary basis.

Your final question asks whether any person or group has a right to remain on Fiesta Island when and if it is temporarily closed. Penal Code section 409.5(c) makes it a misdemeanor for an unauthorized person to wilfully enter or remain in an area which is closed off as a result of an emergency. Therefore, if an emergency situation arises in which it becomes necessary to close off Fiesta Island, all unauthorized people on the Island may be forced to leave and people who wish to enter the Island may be prevented from doing so. Furthermore, if an ordinance limiting access to Fiesta Island during certain times of the evening were enacted, such an ordinance could impose a misdemeanor penalty for anyone who enters or remains on the island during the restricted hours.

Additionally, it should be mentioned that this office has prepared draft proposals of five ordinances which prohibit public possession or consumption of alcoholic beverages. The fifth proposal includes extending the prohibition to all public beach areas during the summer months. Since all of Fiesta Island except that area closed to the public and maintained by the Water Utilities Department is a public beach area as defined in San Diego Municipal Code section 63.20, the fifth proposal could greatly reduce alcohol related problems and may alleviate the need for an ordinance which requires the temporary closure of Fiesta Island. Any of the other ordinances could be amended to specifically include Fiesta Island in the restricted areas.

Please contact our office if you have further questions.

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By

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Deputy City Attorney

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